Supreme Court, U.S.
FILED
05-624 NOV - 7 2005
No. OFFICE OF THE CLERK

In The Supreme Court of the United States

SOBHY SHEHATA HANA,
Petitioner,

v.

ALBERTO GONZALES,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI
with Appendix

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November, 2005

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QUESTION PRESENTED

I. Whether Petitioner's due process rights were violated where his attorney failed to apply for a waiver of removal under INA § 237(a)(1)(H) when Petitioner was prima facie eligible for a 237(a)(1)(H) waiver?

PARTIES AND COUNSEL IN PROCEEDINGS BELOW

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OPINION BELOW

The opinion of Court of Appeals for the Sixth Circuit was entered on April 18, 2005, under the caption Hanna v. Gonzales, Nos. 03-3550; 04-3065 (6th Cir. 2005)(unpublished). The decision is attached hereto as Appendix B. Petitioner filed a timely Petition for Panel Rehearing only in the 04-3065 case. The Petition for Rehearing was denied on August 9, 2005. The Order is attached hereto as Appendix A.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on April 18, 2005. The Sixth Circuit Court of Appeals had jurisdiction over this matter under 8 U.S.C. § 1252 as there had been a final adjudication on the merits by the Board of Immigration Appeals on December 17, 2003.

This Petition for Writ of Certiorari has been filed and docketed within the time limits prescribed as it was mailed within 90 days of the date the Petition for Rehearing was denied. The instant Petition is only being filed with respect to the 04-3065 case. Thus, the jurisdiction of this Court is properly invoked.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

INA § 237(a)(1)(H):

"Waiver authorized for certain misrepresentations.

—The provisions of this paragraph relating to the removal of aliens within the United States on the ground that they were inadmissible at the time of admission as aliens described in section 212(a)(6)(C)(i), whether willful or innocent, may, in the discretion of the Attorney General, be waived for any alien (other than an alien described in paragraph (4)(D)) who—

(i) (I) is the spouse, parent, son, or daughter of a citizen of the United States or of an alien lawfully admitted to the United States for permanent residence; and 237(a)(1)(H)(i)(II) was in possession of an immigrant visa or equivalent document and was otherwise admissible to the United States at the time of such admission except for those grounds of inadmissibility specified under paragraphs (5)(A) and (7)(A) of section 212(a) which were a direct result of that fraud or misrepresentation.

(ii) is an alien who qualifies for classification under clause (iii) or (iv) of section 204(a)(1)(A) or clause (ii) or (iii) of section 204(a)(1)(B).

A waiver of deportation for fraud or misrepresentation granted under this subparagraph shall also operate to waive removal based on the grounds of inadmissibility directly resulting from such fraud or misrepresentation."

Fifth Amendment to the U.S. Constitution:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

REASONS FOR GRANTING THE WRIT

A writ of certiorari should be granted in the instant case to address a circuit split with respect to the issue of whether an alien is entitled to reopening based on ineffective assistance of counsel where counsel's actions deprive an alien of the opportunity to apply for discretionary relief from removal. In the instant case, Petitioner was deprived of an opportunity to apply for a waiver under INA § 237(a)(1)(H) due to counsel's failure to request this relief from removal. However, the Sixth Circuit held that an alien cannot raise a claim of ineffective assistance of counsel where counsel's ineffectiveness relates to discretionary relief from removal. The Sixth Circuit's decision is inconsistent with decisions of the Second and Ninth Circuits, which have allowed for reopening of a removal case where an alien was deprived of effective assistance of counsel due to counsel's actions in preventing the alien from reasonably presenting her case. See e.g. Castillo-Perez v. INS, 212 F.3d 518 (9th Cir. 2000); Rodriguez-Lariz v. INS, 282 F.3d 1218 (9th Cir. 2002); Rabiu v. INS, 41 F.3d 879 (2d. Cir. 1994); But see Mejia-Rodriguez v. Reno, 178 F.3d 1139, 1146 (11th Cir. 1999)(no due process violation where the ineffective

assistance of counsel related to discretionary relief); Natavi-Gomez v. Ashcroft, 344 F.3d 805 (8th Cir. 2003)(same); Huicochea-Gomez v. INS, 237 F.3d 696, 699 (6th Cir. 2001)(same).

Petitioner contends that an alien's due process rights are violated where an alien is wholly deprived of an opportunity to apply for relief from removal. The instant case clearly involves an issue of exceptional importance for aliens in removal proceedings who have been adversely impacted by their attorney's failure to pursue relief from removal for which they were eligible. Due process applies to aliens in removal proceedings, which includes the right to the effective assistance of counsel. Due process requires a full and fair removal hearing. Petitioner contends that he has a protected liberty interest to a full and fair hearing, which includes applying for relief from removal for which he is eligible.

The decisions of those courts that have held that an alien cannot raise a claim of ineffective assistance of counsel where the claim relates to discretionary relief fail to recognize that counsel's actions have deprived an alien an opportunity to a full and fair removal hearing. An alien has a protected liberty interest in receiving a full and fair

hearing, which includes raising all viable defenses to removal. In the instant case, Petitioner was wrongly deprived of an opportunity to apply for a waiver of removal due to ineffective assistance of counsel. The Board's rationale for allowing an alien to raise a claim of ineffective assistance of counsel was to protect aliens against incompetent counsel. See Matter of Lozada, 19 I&N Dec. 637 (BIA 1988). This rationale is undermined when an alien is not permitted to raise an ineffective assistance of counsel claim when it is related to discretionary relief.

Review by this Court is necessary to resolve a circuit split on an extremely important question regarding the scope of due process rights in removal proceedings when an alien raises a claim of ineffective assistance of counsel. The Board of Immigration Appeals and federal courts have recognized the importance of nationwide uniformity of the application of immigration laws. Bedoya-Valencia v. INS, 6 F.3d 891, 895 (2d Cir. 1993); Matter of Manrique, 21 I&N Dec. 58, 64 (BIA 1995). However, the circuits are currently split as to the application of Lozada ineffective assistance of counsel claims when related to discretionary relief. This Court's guidance is essential to

address when an alien can raise a claim of ineffective assistance of counsel in removal proceedings. For the reasons set forth herein, the writ should be granted for review of this extremely important issue.

STATEMENT OF THE CASE AND FACTS

Petitioner is a native and citizen of Egypt. Petitioner is married to a United States citizen and has three United States citizen children.

Petitioner last entered the United States on March 27, 1987 as a lawful permanent resident and has continuously resided in the U.S. since that time. He obtained his permanent resident status through a visa petition filed by his mother on his behalf.

On June 30, 1997, the former Immigration and Naturalization Service issued a Notice to Appear charging Petitioner with being subject to removal under INA § 237(a)(1)(A) as an alien who had procured or sought to procure a visa, admission into the United States, or other benefit under the Immigration and Nationality Act by fraud or willful misrepresentation of a material fact.

Petitioner hired Bernard Mosesson, Esq. to represent him during removal proceedings. Mr. Mosesson represented Petitioner before the Immigration Court and filed Petitioner's appeal and brief with the Board of Immigration Appeals.

During removal proceedings before the Immigration Judge, Petitioner contested that he was subject

to removal as charged by the former Immigration and Naturalization Service in the Notice to Appear. The Immigration Judge sustained the charge of removal. Although statutorily eligible for a waiver of this ground of removal under INA § 237(a)(1)(H), Petitioner's counsel never requested a waiver under this section. Instead, counsel requested a waiver under INA § 212(i). However, Petitioner needed an approved visa petition, which he did not have, in order to be eligible to apply for a waiver under INA § 212(i). Thus, the Immigration Judge ordered removal. The Judge's decision was affirmed on appeal by the Board of Immigration Appeals.

Within 90 days of the Board's decision, Petitioner, through current counsel's office, filed a Motion to Reopen alleging that he was deprived of the effective assistance of counsel where his attorney failed to request a waiver under INA § 237(a)(1)(H) when he was clearly eligible for a waiver under that section. In support of his Motion to Reopen, Petitioner submitted evidence establishing that he complied with the Board's requirements for raising a claim of ineffective assistance of counsel and attached a completed waiver form with supporting documentation.

On December 17, 2003, the Board of Immigration Appeals denied Petitioner's Motion to Reopen. Relying on the Sixth Circuit's decision in Huicochea-Gomez, the Board concluded that counsel's failure to file a waiver under INA § 237(a)(1)(H) did not violate his due process rights. See Huicochea-Gomez v. INS, 237 F.3d 696, 699 (6th Cir. 2001). "Specifically, the respondent has not established that, but for his former counsel's advice regarding waivers, and his failure to apply for a 237(a)(1)(H) waiver, he would have been entitled to continue residing in the United States." (Appendix C) Without addressing Petitioner's substantial equities, the Board also concluded that the Motion to Reopen should be denied as a matter of discretion. Id.

Petitioner filed a Petition for Review with the Sixth Circuit Court of Appeals. However, the panel, relying on Huichochea-Gomez, held that no due process violation occurred because no due process violation occurs where counsel's errors deprive an alien from applying for discretionary relief from removal. (Appendix C, pp. 4-6) Thus, the panel concluded that counsel's failure to apply for a waiver did not violate Petitioner's due process rights.

The panel did not address the issue regarding the denial of the Motion to Reopen as a matter of discretion.

Petitioner filed a timely Petition for Rehearing and Suggestion for Rehearing En Banc with respect to the Board's denial of the Motion to Reopen. Petitioner argued that he was deprived of a full and fair hearing and thus his due process rights were violated where counsel's actions deprived Petitioner an opportunity to apply for a waiver of removal. On August 9, 2005, the Sixth Circuit denied the Petition for Rehearing and Suggestion for Rehearing En Banc.

ARGUMENT

I. Petitioner was denied the effective assistance of counsel and his due process rights were violated when his attorney failed to apply for a waiver of removal under INA § 237(a)(1)(H). Thus, Petitioner's Motion to Reopen should have been granted.

"Fifth Amendment guarantees of due process extend to aliens in deportation proceedings, entitling them to a full and fair hearing." Huicochea-Gomez v. INS, 237 F.3d at 699; Reno v. Flores, 507 U.S. 292, 306 (1993). "The fundamental requirement of due process is the right to be heard at a meaningful time and in a meaningful manner." Mathews v. Eldridge, 424 U.S. 319, 333 (1976). Due process in immigration proceedings includes the right to a full and fair hearing. Landon v. Plasencia, 459 U.S. 21 (1982). Ineffective assistance of counsel violates an alien's due process rights. Hamid v. Ashcroft, 336 F.3d 465, 468 (6th Cir. 2003).

The Board of Immigration Appeals has held that an alien can raise a claim of ineffective assistance of counsel in removal proceedings. Matter of Lozada, 19 I&N Dec. 637 (BIA 1988). Lozada set forth three requirements to raising a claim of ineffective assistance of counsel in a

motion to reopen. A motion to reopen or reconsider based on a claim of ineffective assistance of counsel requires that: (1) the motion be supported by an affidavit from the respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard; (2) counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and given an opportunity to respond; and (3) the motion reflect whether a complaint has been filed with the appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not. Id. There is no dispute in the instant case that Petitioner met these requirements.

In 2003, the Board again examined whether an alien could assert a claim of ineffective assistance of counsel in immigration proceedings. Matter of Assaad, 23 I&N Dec. 553 (BIA 2003). In holding that there was no valid reason to depart from its prior practice of recognizing ineffective assistance of counsel claims in removal proceedings, the Board stated that "Matter of Lozada provides a measure of protection for aliens who are prejudiced by incompetent

counsel." Id. at 556. "As a removal proceeding has the potential to deprive a respondent of the right to stay in the United States, which can include separation from family and return to possible persecution, the procedures in that proceeding must be fundamentally fair." Id. In Assaad, the Board concluded that counsel's failure to file an appeal with the Board did not constitute ineffective assistance of counsel where the respondent did not show there was an error in the immigration judge's decision or that he was eligible for any relief from removal. Id. at 562.

In the instant case, reopening was warranted due to ineffective assistance of counsel. Petitioner's attorney's representation was ineffective depriving him of a full and fair hearing. His attorney failed to file for a waiver under INA § 237(a)(1)(H)[1] despite the fact he was eligible for a waiver and had residence of long duration, significant family ties, and other equities that supported the grant of the waiver. Id.

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[1] It is not disputed that Petitioner was eligible for a waiver under INA § 237(a)(1)(H). He was in possession of an immigrant visa when he came to the United States and has four qualifying U.S. citizen relatives (wife and three children). If granted, Petitioner would still be considered a lawful permanent resident and his prior entry would be considered lawful.

Although counsel inexplicably failed to apply for a waiver that would have allowed Petitioner to remain in the United States as a lawful permanent resident, the Sixth Circuit found that he did not establish a due process violation. The panel relied on the Court's prior decision in Huicochea-Gomez.

In Huicochea-Gomez, the Sixth Circuit held that ineffective assistance of counsel claims are reviewed to determine whether there has been a due process violation. Huicochea-Gomez v. INS, 237 F.3d at 699. In Huicochea, the Huicocheas filed a motion to reopen alleging ineffective assistance of counsel due to counsel's ignorance regarding the change in immigration laws. Id. at 698. Counsel led the Huicocheas to believe that they were eligible to legalize their status in the United States and brought them to the attention of the former Immigration and Naturalization Service, which commenced proceedings against them. Id. Counsel mistakenly believed that the Huicocheas were eligible for suspension of deportation, which required seven years of continuous presence in the United States. Id. at 699. However, the law had changed and it now required ten years of continuous presence in the United States. Id. Additionally, an alien's physical

presence is now deemed to stop upon placement in removal proceedings. Id. Due to the changes in the law, the Huicocheas were no eligible for cancellation of removal and deemed deportable.

The Sixth Circuit stated that to prevail, "the Huicocheas must establish that but for Walker's legal advice, they would have been entitled to continue residing in the United States." Id. at 699-700. The Court did not elaborate on what showing was necessary to establish that they "would have been entitled to continue residing in the United States." Id. The Sixth Circuit held that the Huicocheas could not show prejudice due to ineffective assistance of counsel because they were ineligible for cancellation of removal or any other relief from removal. Id.

In the instant case, Petitioner is not contesting the denial of a discretionary form of relief. Petitioner is challenging his attorney's failure to file for such relief before the Immigration Court. Due to counsel's complete failure to request a waiver under INA § 237(a)(1)(H), Petitioner was never given a hearing on his waiver application, at which time he could have presented evidence and testimony establishing that he was entitled to

such a waiver. Thus, neither the Immigration Court nor the Board ever had an opportunity to consider his waiver application on the merits. A grant would have made Petitioner admissible nunc pro tunc from the time of his admission in 1987. Petitioner has established a due process violation.

There is a split among the circuits regarding whether a due process claim can be raised based on ineffective assistance of counsel for depriving an alien the opportunity to apply for discretionary relief. The Ninth and Second Circuits have held that a due process violation occurs where counsel's actions deprive an alien the opportunity to apply for discretionary relief.

The Ninth Circuit has held that an alien can establish prejudice in an ineffective assistance of counsel claim where "the performance of counsel was so inadequate that it may have affected the outcome of the proceedings." Ortiz v. INS, 179 F.3d 1148, 1153 (9th Cir. 1999); Mohammed v. Gonzales, 400 F.3d 785, 794 (9th Cir. 2005)(failure to present evidence of past genital mutilation in support of asylum claim is ineffective assistance of counsel). This occurs when an alien is "prevented from reasonably presenting his case." Lopez v. INS, 775 F.2d

1015, 1017 (9th Cir. 1985); Castillo-Perez v. INS, 212 F.3d 518 (9th Cir. 2000)(Ninth Circuit found ineffective assistance of counsel where counsel failed to file a timely suspension of deportation application where the alien was prima facie eligible for this relief from removal).

In 2002, the Ninth Circuit addressed an ineffective assistance of counsel claim where counsel failed to file an application for suspension of deportation where petitioners were clearly eligible for this form of relief. Rodriguez-Lariz v. INS, 282 F.3d 1218 (9th Cir. 2002). The Ninth Circuit found that petitioners clearly suffered prejudice as a result of counsel's failure to file their applications for suspension of deportation as this "unquestionably affected the outcome of the proceedings." Id. at 1226. The Court also responded to the Service's position that the case did not warrant reopening because petitioners were not entitled to the underlying relief sought. Id. at 1227. The Ninth Circuit found that the BIA did not sufficiently treat their claim for suspension of deportation. There was no individualized analysis of the equities of petitioners' claim and no reasons for its decision. "We thus hold the constitutionally ineffective assistance rendered by Torres and his associates constitutes an independent ground

requiring reversal of the BIA's denial of petitioners' motion to reopen because it likely resulted in prejudice to petitioners." Id.

In Rabiu v. INS, 41 F.3d 879 (2d. Cir. 1994), the Second Circuit Court of Appeals held that the failure of Rabiu's lawyer to file a timely application for a waiver of deportation constituted ineffective assistance of counsel. The Second Circuit found that the appropriate standard for determining whether an alien can establish prejudice in an ineffective assistance of counsel claim is whether the alien is prima facie eligible for the relief requested and he could have made a strong showing in support of his application. Id. at 883. The Second Circuit concluded that Rabiu made a prima facie showing that he was eligible for relief under former INA § 212(c) and that he was a strong candidate for that relief despite his serious criminal conviction. Id. He had resided in the United States for 15 years, his father, sisters, and cousins all resided in the United States, and he had a long history of employment in the United States. Id. Thus, the Court found that he was prejudiced by ineffective assistance of counsel. Id.

Other circuits have sided with the Sixth Circuit and held that an alien cannot raise a claim of ineffective

assistance of counsel where the claim relates to discretionary relief. See e.g. Mejia-Rodriguez v. Reno, 178 F.3d 1139, 1146 (11th Cir. 1999); Natavi-Gomez v. Ashcroft, 344 F.3d 805 (8th Cir. 2003). The cases on this side hold that aliens do not hold constitutionally protected interests in purely discretionary relief. The cases generally rely on a Supreme Court decision holding that the expectancy of receiving purely discretionary relief does not give rise to a liberty interest protected by the Due Process Clause. Connecticut Board of Pardons v. Dumschat, 452 U.S. 458, 465 (1981). In Dumschat, respondent, a life inmate at the Connecticut state prison, sued where commutation of his life sentence had been rejected by the Connecticut Board of Pardons without any explanation. The United States Supreme Court held that respondent had no constitutional right to the commutation of his sentence even where commutation was frequently granted.

Aliens like Hanna are in a much different situation than Dumschat. Hanna has been deprived of any opportunity to apply for a discretionary waiver of removal that would have allowed him to remain in the United States. This is different than a denial of the underlying relief itself. Petitioner had a protected interest to a full and

fair hearing, which includes applying for relief from removal for which he is eligible. "[I]t is perfectly sensible to talk about a liberty or property interest in a right to apply for . . . relief, even if there is no such interest in the relief itself, particularly when consideration of potential eligibility goes to the heart of a deportation hearing's fairness." United States v. Lepore, 304 F.Supp.2d 183, 198 (D. Mass. 2004) (holding that the failure of a hearing officer to advise an alien of eligibility for a 212(c) waiver is a fundamental procedural error and a dur process violation). An alien is entitled to apply for relief for which he is eligible, although he is not entitled to the grant of such relief. Id.; El Moraghy v. Ashcroft, 331 F.3d 195 (1st Cir. 2003)(denial of 212(c) waiver not based on substantial evidence because judge failed to take into consideration several relevant factors).

In order to protect aliens from incompetent attorneys, the Board set forth a procedure for filing ineffective assistance of counsel claims. The Sixth Circuit's decision as well as other circuits that have ruled the same way effectively eliminates the ability of an alien to raise a claim of ineffective assistance of counsel. The majority of the issues in removal proceedings involve applications for

discretionary relief such as adjustment of status, cancellation of removal, asylum, and various waivers of removal. Furthermore, any request to reopen is also a discretionary remedy. 8 U.S.C. § 1003.2(a). Thus, the decisions that side with the Sixth Circuit could be read so broadly as eliminating the ability to move to reopen based on ineffective assistance of counsel. This is clearly not what was meant by the Board in Lozada.

Due process in immigration proceedings requires a full and fair hearing and an alien's due process rights can be violated based on ineffective assistance of counsel. Thus, the question must be whether Petitioner received a full and fair hearing based on his counsel's actions. An alien should not be precluded from establishing this where the deprivation of a full and fair hearing relates to a discretionary application that would prevent his removal from the United States. An alien certainly can make such a showing where his attorney fails to apply for relief for which the alien is eligible. This is especially true where the alien makes a strong showing for such relief as in the instant case. Petitioner has resided in the United States for a long period of time and has a United States citizen wife and three United States children. Petitioner has a protected

interest in receiving a full and fair hearing in which he can present all viable defenses to removal.

In the instant case, counsel's failure to apply for discretionary relief violated Petitioner's due process rights. Ineffective assistance of counsel deprived Petitioner fundamental fairness as he was not given a chance to apply for a waiver that would have allowed him to stay in the United States. Additionally, Petitioner made a strong showing he was entitled to such relief. Petitioner has continuously resided in the United States since 1987. He has a United States citizen wife and three United States citizen children. See Matter of Cavazos, 17 I&N Dec. 215, 217 (BIA 1980)(the existence of United States citizen family members is a significant equity).

The Court should grant Petitioner's writ of certiorari to address the significant issue raised herein, which has divided the federal appellate courts. Petitioner contends that an alien's due process rights are violated where counsel's actions deprive an alien the opportunity to apply for relief from removal, even where the relief is purely discretionary. The removal hearing cannot be said to be fundamentally fair where an alien is prevented from

applying for relief that would have allowed him to remain in the United States.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

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APPENDIX

6TH CIRCUIT FILINGS:

Order Denying Petition for
Rehearing En Banc,
filed 08/09/05 . . . . . A1 - A2

Opinion,
filed 04/18/05 . . . . . B1- B8

BOARD OF IMMIGRATION APPEALS FILINGS:

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Nos. 03-3550/04-3065

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SOBHY SHEHATA HANNA,
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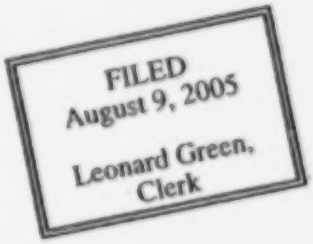
v.

ALBERTO R. GONZALES,
ATTORNEY GENERAL,
Respondent.



ORDER

BEFORE: BOGGS, Chief Judge; COOK, Circuit Judge; and BEER,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

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*Hon. Peter Beer, Senior United States District Judge for the Eastern District of Louisiana, sitting by designations.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

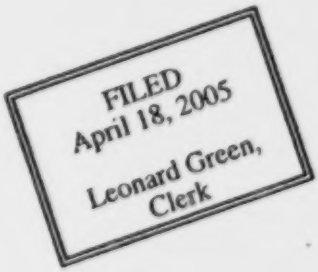
File Name: 05a0289n.06
Filed: April 18, 2005
Nos. 03-3550, 04-3065

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

SOBHY SHEHATA HANNA,
Petitioner,

v.

ALBERTO R. GONZALES,
Attorney General,
Respondent.



ON PETITION FOR REVIEW OF ORDERS OF THE BOARD OF IMMIGRATION APPEALS

Before: BOGGS, Chief Judge; COOK, Circuit Judge; BEER, District Judge.*

COOK, Circuit Judge. Sobby Shehata Hanna petitions for review of an order of removal and an order denying his motion to reopen proceedings before the BIA. Because

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*The Honorable Peter Beer, United States District Judge for the Eastern District of Louisiana, sitting by designation.

substantial evidence supports the IJ's removal decision and because the BIA correctly denied Hanna's motion to reopen, we deny the petitions for review.

I

Hanna, an Egyptian national, first arrived in the United States in 1982. Shortly after his arrival, Hanna married an American citizen, Elsie Rasnick. That marriage did not endure—the couple separated on their wedding day when Rasnick informed Hanna she was pregnant with another man's child. Importantly, Hanna and Rasnick never lived together.

Attempting to reap the benefit of his marriage to Rasnick, Hanna applied for adjustment of status, noting, untruthfully, on his application that he lived with Rasnick. Rasnick later withdrew the visa petition supporting Hanna's application, prompting the INS eventually to deny the application. In the meantime, Hanna divorced Rasnick and returned to Egypt.

Hanna returned to the United States in 1987. On his 1987 immigrant visa application, Hanna answered "No" to the question whether he was an alien who had "procure[d] or attempt[ed] to procure a visa or other documentation by fraud or willful misrepresentation." The INS—presumably failing to discover Hanna's 1982 attempt to gain permanent status—granted him admission as the child of a lawful permanent alien resident, his mother.

About ten years later, the INS, clued by facts unknown to us and irrelevant to our decision, discovered Hanna's 1982 application and therefore charged him with removability as an alien who "by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this chapter." 8 U.S.C. § 1182(a)(6)(C)(i). *See also* 8 U.S.C. § 1227(a)(1)(A). The IJ found Hanna removable for materially misrepresenting on his 1982 application that he lived with Rasnick, and the BIA dismissed Hanna's appeal.

Hanna then moved the BIA to reopen his case, alleging that his attorney had rendered ineffective assistance by failing to file for a waiver of removal. The BIA denied Hanna's motion to reopen, holding that even if Hanna were eligible for a waiver, Hanna lacked a liberty interest protected by the Due Process Clause of the Fifth Amendment given the discretionary nature of the waiver. In the absence of such an interest, Hanna had no constitutional right to effective assistance of counsel. Hanna petitions for review of both BIA decisions.

II

A. Removal

This court reviews removal orders under the familiar substantial-evidence standard. 8 U.S.C. § 1252(b)(4)(B) ("[A]dministrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary . . . ."). Here, substantial evidence supports the IJ's conclusion that Hanna willfully misrepresented a material fact when he sought to obtain status as a permanent resident. That is, Hanna claimed, under oath, that he lived with Rasnick when he did not.

Whether a fact is material depends on "whether the misrepresentation or concealment was predictably capable of affecting, *i.e.*, had a natural tendency to affect, the official decision." *Kungys v. United States*, 485 U.S. 759, 771 (1988). As the immigration judge correctly noted, the fact that Hanna did not reside with his wife was material because "[i]f the INS were aware that the parties did not reside together, it would result in an inquiry into the validity of this relationship."

Hanna, however, contends that because a friend filled out his 1982 application, he never knew its contents, and thus he did not *willfully* misrepresent any fact. But, assuming Hanna's story to be true—a generous assumption given the overwhelming evidence demonstrating the Hanna-Rasnick marriage to be a sham—the law still charges Hanna with knowledge of the application's contents. Hanna signed, under oath, his 1982 adjustment-of-status application. His failure to apprise himself of the contents of this important document constituted deliberate avoidance—an act the law generally does not recognize as a defense to misrepresentation. *See Bautista v. Star Cruises*, 396 F.3d 1289, 1301 (11th Cir. 2005) (noting that one "who has executed a written contract

and is ignorant of its contents cannot set up that ignorance to avoid the obligation"), (internal quotation marks and citation omitted); *United States v. Puente*, 982 F.2d 156, 159 (5th Cir. 1993) (holding "a defendant who deliberately avoids reading the form he is signing cannot avoid criminal sanctions for any false statements contained therein").

B. Reopening

In a separate reopening proceeding before the BIA, Hanna claimed he was denied effective assistance of counsel. Hanna argues that counsel's failure to seek a discretionary waiver of removal under 8 U.S.C. § 1227(a)(1)(H) violated his Fifth Amendment right to counsel. We disagree, because Hanna possessed no constitutionally protected liberty interest in receiving a *discretionary* waiver.

To prove an ineffective-assistance-of-counsel claim under the Fifth Amendment's Due Process Clause, an alien must prove that but for his attorney's errors he "would have been *entitled* to continue residing in the United States." *Huicochea-Gomez v. INS*, 237 F.3d 696, 699-700 (6th Cir. 2001) (emphasis added). But no due process violation occurs

when an attorney's errors cause an alien to be denied discretionary relief. *Id.* at 700 ("The failure to be granted discretionary relief does not amount to a deprivation of a liberty interest.") (citing *Mejia Rodriguez v. Reno*, 178 F.3d 1139, 1146 (11th Cir. 1999)). And 8 U.S.C. § 1227(a)(1)(H)—providing that removal of an alien found inadmissible for attempting to procure a visa or other documentation through fraud or material misrepresentation "may, in the discretion of the Attorney General, be waived"—affords only discretionary relief. *See INS v. Yueh-Shaio Yang*, 519 U.S. 26, 30 (1996) (concluding that the nearly identical predecessor of 8 U.S.C. § 1227(a)(1)(H) imposed no limitation on what the Attorney General could consider when deciding whether to grant discretionary relief). Thus, the failure of Hanna's attorney to file for a waiver of removal did not violate Hanna's due process rights, and the BIA did not err in denying Hanna's motion to reopen.

Hanna, however, claims he is not contesting "the denial of a form of discretionary relief," but instead challenging "his attorney's failure to file for such relief before the Immigration Court," which deprived him of even being

considered for the waiver. But this distinction lacks constitutional significance. Without a cognizable liberty or property interest at stake, a due process violation cannot occur. *See Tefel v. Reno*, 180 F.3d 1286, 1301 (11th Cir. 1999) ("Thus, just as Plaintiffs enjoy no 'liberty or property' interest in their expectancy of receiving suspension of deportation, they enjoy no 'liberty or property' interest in being eligible to be considered for suspension.").

III

For the foregoing reasons, we deny the petitions for review.

U.S. Department of Justice
Executive Office of Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A40118763 - Detroit

In re: SOBHY SHEHATA HANNA

IN REMOVAL PROCEEDINGS

FILED
December 17, 2003
Board of
Immigration
Appeals

MOTION

ON BEHALF OF RESPONDENT: Scott Bratton, Esquire

CHARGE:

Notice: Sec. 212(a)(6)(C)(i), I&N Act [8 U.S.C. § 1182(a)(6)(C)(i)]- Fraud or willful misrepresentation of material fact

APPLICATION: Reopening

ORDER:

PER CURIAM. This case was last before us on March 21, 2003, when we dismissed the respondent's appeal. The respondent has filed a timely motion to reopen proceedings, alleging ineffective assistance by his former counsel. The respondent's motion will be denied.

The respondent has substantially complied with the requirements enumerated in *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988) for establishing a claim of ineffective assistance of counsel. However, we do not find that he has established that his former counsel's failure to pursue a waiver, under section 237(a)(1)(H) of the Immigration and Nationality Act, violated his due process rights, *See Huicochea-Gomez v. INS*, 237 F.3d 696 (6th Cir. 2001) (finding that the failure to be granted discretionary relief does not amount to deprivation of a liberty interest). Specifically, the respondent has not established that, but for his former counsel's advice regarding waivers, and his failure to apply for a 237(a)(1)(H) waiver, he would have been "entitled to continue residing in the United States." *Id.* at 699. Hence, we do not find that the respondent has adequately established that his case warrants reopening due to ineffective assistance of counsel. *Id.*

Furthermore, we find that the respondent's motion to reopen for 237(a)(1)(H) relief warrants denial as a matter of discretion. In this regard, we note that the United States Court of Appeals for the Sixth Circuit, in which jurisdiction

the instant case arises, upheld a decision by this Board which stated that neither the courts nor the Board have "been lenient toward aliens who have flouted our immigration laws by engaging in fraudulent marriages to United States citizens or lawful permanent residents." *See Dallo v. INS*, 756 F.2d 581, FN7 (6th Cir. 1985). Congress has emphatically expressed its disapproval of such conduct by the enactment of section 204(c) of the At, 8 U.S.C. § 1154(c), which precludes from immediate relative or preference status any alien who has previously entered, or attempted or conspired to enter, into a sham marriage for the purpose of obtaining an immigration benefit. Id. Here, the respondent not only attempted to adjust his status based on a fraudulent marriage, but he subsequently committed a further fraud by applying for a visa and indicating that he had never previously attempted to procure a visa or other documentation through fraud. *See* I.J. at 3; *see also* Exh. 2, allegation #4 (found). Thus, as the respondent has repeatedly disregarded United States immigration law, and as Congress has denied preference status to aliens in similar circumstances who are outside the United States, it is reasonable to require the respondent to demonstrate substantial equities to warrant reopening of his removal

proceedings. *See Dallo v. INS*, supra, at FN7. Mere statutory qualification for a 237(a)(1)(H) waiver should not suffice. Id. We do not find that the respondent, in this case, has demonstrated such substantial equities.

Accordingly, the respondent's motion to reopen is denied.

/s/ David B. Holmes
FOR THE BOARD